UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
800 K STREET, NW, SUITE 400 NORTH
WASHINGTON, DC 20001-8002

DATE: May 8, 1997
CASE NO.: 85-CAA-1

In the Matter of:

DONALD J. WILLY,
Complainant

v.

THE COASTAL CORPORATION AND
COASTAL STATES MANAGEMENT COMPANY,
Respondent

BEFORE: John M. Vittone
Chief Administrative Law Judge

RECOMMENDED DECISION AND ORDER ON DAMAGES, FEES AND COSTS

This matter [1] is before me [2] on remand from the Secretary of Labor. *Willy v. The Coastal*

[1]Page citations to DOL decisions in this recommended order are to decisions reported on the Internet by the OALJ Law Library (www.oalj.dol.gov). A Web site page number citation is preceded by an "@".

[2]Administrative Law Judge Theodore von Brand originally presided over this matter, but had retired by the time that the Appeal File was returned to the Office of Administrative Law Judges in December 1995. For a short period, this matter was reassigned to Administrative Law Judge Charles P. Rippey. Judge Rippey was assigned because he had nearly cleared his docket in anticipation of retirement, and was available to give immediate attention to this matter, whereas my docket and administrative duties were both heavy. The reason for the reassignment, however, had not been explained to Complainant, who objected to the reassignment; accordingly the matter was returned to the undersigned's docket. The only substantive order issued by Judge Rippey was his request for clarification by the Secretary; *see Willy v. The Coastal Corp.*, 85-CAA-1 (ALJ June 19, 1996), the clarification order was decided in Complainant's favor. *See Willy v. The Coastal Corp.*, 85-CAA-1 (ARB July 1, 1996). Further, the Board's clarification order was consistent with my earlier ruling in the Order dated March 27, 1996. *See Willy v. The Coastal Corp.*, 85-CAA-1 (ALJ July 1, 1996). Thus, I ratify, *nunc pro tunc*, the orders issued by Judge Rippey during his brief assignment to this matter.

Corp., 85-CAA-1 (Sec'y June 1, 1994), *motion for recon. den.* (Sec'y July 13, 1995).[3] In the remand order, the Secretary determined that the Complainant was fired as an in-house attorney for the Respondent in part in retaliation for the Complainant's internal memorandum on Respondent's alleged violations of environmental laws. The administrative law judge who originally presided over this matter had recommended against providing relief to Complainant to safeguard the integrity of the adjudicative process, because the Complainant "gave untruthful or misleading testimony concerning his job status" at deposition and at the hearing that was "inherently deceptive and calculated to affect the outcome of the case." *Willy v. The Coastal Corp.*, 85-CAA-1 @ 30-32 (ALJ Nov. 29, 1988).The Secretary found that the central purpose of

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[3]Mr. Willy's complaint in this matter, which arises in a jurisdiction covered by Fifth Circuit law, was completely internal in nature. *Willy v. The Coastal Corp.,* 85-CAA-1 @ 8 (Sec'y June 1, 1994). The Fifth Circuit determined in *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), that internal complaints are not covered by the whistleblower provision of the Energy Reorganization Act. The ERA was amended in 1992 to overrule this decision legislatively. Mr. Willy's complaint was not based on the ERA, but several environmental whistleblower provisions, which were not amended, and which contain language relevant to the *Brown & Root* analysis that is virtually identical to the pre-1992 ERA.

Secretary Robert B. Reich recognized in *Grover v. Houston Lighting & Power*, 93-ERA-4 (Sec'y Mar. 16, 1995), that *Brown & Root* controls in the Fifth Circuit, citing *Goldstein v. Ebasco Constructors, Inc.*, 86-ERA-36 (Sec'y Aug. 16, 1993). This acquiescence in *Brown & Root* occurred after Secretary Reich's remand order in *Willy v. The Coastal Corp.,* 85-CAA-1 (Sec'y June 1, 1994), in which the Secretary had rejected Respondents' internal complaint argument, finding that it had already been decided in *Willy v. The Coastal Corp.,* 85-CAA-1 (Sec'y June 4, 1987), and that *Brown & Root* only applies to the ERA. In Secretary William E. Brock's June 4, 1987 remand order, he had "respectfully decline[d] to follow the Fifth Circuit's decision in *Brown & Root*", and specifically invited the Fifth Circuit to reconsider its decision. Secretary Reich's rationale that *Brown & Root* applies only to the ERA was a new one -- it was not a ground stated in Secretary Brock's 1987 decision.

If *Grover* had been the Secretary's last ruling on the internal complaint issue acquiescing in *Brown & Root*, I would have found that this was intervening, controlling law that required adoption of Judge von Brand's original 1985 recommended decision dismissing this complaint based on *Brown & Root*, *see Willy v. The Coastal Corp.*, 85-CAA-1 @ 4 (ALJ May 6, 1985) ("*Brown & Root* makes it clear that the Fifth Circuit would apply the same narrow construction to the statutory provisions applicable to this proceeding"), and therefore recommended dismissal of the remand proceeding as moot.

In *Carson v. Tyler Pipe Co.*, 93-WPC-11 (Sec'y Mar. 24, 1995), however, Secretary Reich held that internal complaints are protected activity under the SWDA and the FWPCA even in the Fifth Circuit. The Secretary distinguished *Brown & Root* based on the 1992 amendments to the ERA, which legislatively overturned that decision. Similarly, in *Hermanson v. Morrison Knudsen Corp.*, 94-CER-2 @ 5 (ARB June 28, 1996), the Administrative Review Board held that "[i]nternal safety complaints are covered under the environmental whistleblower statutes in the Eighth Circuit, the Fifth Circuit and every other circuit. See Amendments to the ERA in the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. No. 102-486, 106 Stat. 2776." The Board noted that "[t]he only current exception to this rule is for cases filed in the Fifth Circuit under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1988), prior to October 24, 1992." *Id.* @ 5 n.4.

Since *Carson* and *Hermanson* indicate that *Brown & Root* is not to be applied to any non-ERA statutes, I find that *Grover* does not moot this remand proceeding.

the environmental whistleblower laws -- to protect both whistleblowers and pubic health and safety -- "would be frustrated if all relief were denied even though the Secretary has found a violation." *Willy v. The Coastal Corp.*, 85-CAA-1 @ 13 (Sec'y June 1, 1994) ; see also generally *id.* @ 13-14.

The scope of the remand order has been an issue in this proceeding. In the interest of administrative efficiency, this recommended order will consider, in addition to back wages and exemplary damages, any non-wage compensatory damages claimed by Complainant, and Complainant's petition for fees and costs, even though the latter items were not specifically addressed in either the Secretary's remand order or the Board's clarification.

Since the undersigned was not the judge who originally presided over this matter, it has been necessary to review all exhibits and transcripts in the very large record. In rendering this recommended decision, *all* documents received into evidence have been carefully reviewed and considered.

I. Reinstatement

Complainant has not requested reinstatement. *See Willy v. The Coastal Corp.*, 85-CAA-1 @ 12 n.12 (Sec'y June 1, 1994); Complainant's Brief on Back Pay and Damages at 1, 3.

II. Back Pay

The Secretary's directions on remand of this matter were for the administrative law judge to

> . . . calculate back pay based on the difference between what Complainant would have earned if he had continued to be paid by Respondent and the amount he earned or with reasonable diligence could have earned from the date of discharge to the date of his discharge from Merichem Corporation. Since Complainant did not leave Merichem because the work was not comparable to the environmental work he was doing for Respondent, but for "paying insufficient attention to his duties," . . . I find that his right to back pay is cut off at the time he stopped working for Merichem. . . .

In my January 17, 1996, order, I notified the parties that I intended to rely on the following findings by Judge von Brand in his Recommended Decision and Order unless a party could establish why a particular finding was not supported by the record. Because no party questioned the validity of these findings, I hereby adopt them.

(1) Complainant was fired by Respondent on October 1, 1984. (Finding 80).
(2) At the time of discharge, Complainant was earning a salary of $57,000-58,000 a year from Respondent. (Finding 93)
(3) Complainant began looking -- unsuccessfully -- for a new job almost immediately following the termination. (Finding 94)

(4) Complainant began work in November 1985 for the State of Texas as a hearing examiner with an annual salary of approximately $28,000 per year. Complainant discontinued this work in September 1987. (Finding 95)

(5) Merichem Company advertised for an attorney to assist its General Counsel in advertisements dated May 31, 1987, and June 3, 1987. Complainant applied and was interviewed several times. (Findings 101 and 102)

(6) Complainant was hired and began work for Merichem Company on October 19, 1987, at a salary of $65,000 per year. (Finding 102)

(7) Merichem terminated Complainant's employment on or about May 26, 1988. (Finding 105)

Reasonable Diligence

Judge von Brand's findings that Complainant almost immediately started looking for a job following his discharge by Respondent, that he took a job as a hearing officer, and the fact that he applied and obtained an attorney position with Merichem, indicate that he exercised reasonable diligence in looking for employment following his unlawful discharge, and I so find.

Actual Earnings - 1984 to 1988

Mr. Willy's Income Tax Returns indicate that he reported the following earnings, and business income for legal services, for the years 1984 to 1988:

1984	-	$49,824.13	
1985	-	$ 4,151.00	($4158.00 unemployment compensation not included)[4]
1986	-	$30,093.25	
1987	-	$40,229.52	($44,179.60 - $3950.08 pension refund)[5]
1988	-	$73,894.19	

[4]Unemployment compensation is not deducted from a back pay award. *Artrip v. Ebasco Services,* Inc., 89-ERA-23 (ARB Sept. 27, 1996) (in Fifth Circuit, deductibility of unemployment compensation is left to discretion of trial court; ARB holds that consistent with prior holding of Secretary of Labor, it will not deduct unemployment benefits from gross back pay award); *Williams v. TIW Fabrication & Machining, Inc.*, 88-SWD-3 (Sec'y June 24, 1992).

[5]Pension income received by a complainant during a back pay period from another source, as opposed to earnings from alternative interim employment, are not deducted from back pay awards. *Artrip v. Ebasco Services, Inc.*, 89-ERA-23 (ARB Sept. 27, 1996). Mr. Willy's 1987 tax return indicates that $3950.08 of the amount reported as "wages, salaries, tips, etc." was a pension refund. It is likely that a pension refund at this time period would have been from a collateral source rather than resulting from alternative interim employment. Since uncertainties in calculating a back pay award are resolved against the discriminating party, *Johnson v. Bechtel Construction Co.*, 95-ERA-11 (Sec'y Sept. 11, 1995), and the burden is on the discriminating party in regard to issues of mitigation of damages, *West v. Systems Applications International*, 94-CAA-15 (Sec'y Apr. 19, 1995), I have not included the pension refund amount as part of the calculation of interim employment

Salary Increases - 1984 to 1988

Because Judge von Brand did not make a finding on what salary increases, if any, the Complainant would have been reasonably entitled to if he had continued to work for the Respondent during the period between his discharge and his termination of employment with Merichem, I permitted the parties to supplement the record in this regard based on *Mosbaugh v. Georgia Power Co.*, 91-ERA-1 and 11 (Sec'y Nov. 20, 1995). I also encouraged the parties to attempt to stipulate to this amount.

The parties evidently discussed a stipulation of an 8.32% as a reasonable annual salary increase for purposes of calculation. Mr. Willy, however, wished to add a stipulation that, "The parties are making no stipulation concerning promotion, and any further pay increases which may result therefrom." There is no indication in the record that the parties came to any final stipulated language, although Mr. Willy did use a 8.3% figure in his Brief on Back Pay and Damages.

Because the parties did not reach a final stipulation on reasonable annual salary increases, I must make a finding of fact in this regard. Respondent contends that 8.32% is a reasonable calculation because "Willy testified that his salary for 1984 was between $57,000.00 and $58,000.00 (TR. 137). Willy testified that he had been told that his salary was to increase to $62,200.00 in 1985 (TR. 188)." Brief at 4. Complainant states that his "salary increase history, as well as that of most Coastal employees, demonstrates annual increase approximating ten percent." Brief at 5. Complainant, however, did not cite any portion of the record to support this assertion, and I find none in the record. Based on the record before me, I find that Respondent's method for calculating reasonable annual salary increases reflects the best indication of what the increases would likely have been. Thus, I find that Complainant's reasonable annual salary increases would have been 8.32%, which is, of course, the amount to which the parties almost stipulated.

At 8.32% for salary increase, Mr. Willy's yearly earnings if he had stayed at Coastal Corporation, and not been promoted, would have been:

1984 - $57,420.00
1985 - $62,197.34
1986 - $67,372.16
1987 - $72,977.52
1988 - $79,049.25

Promotions

Mr. Willy started work for Respondent in May 1981. Von Brand Finding of Fact 1. Thus, it is not inconceivable that he may have been promoted prior to May 1988, but whether he would have been is far too speculative to determine. I find insufficient evidence in this record to support a finding that Mr. Willy would have gotten a promotion or how much money that would

have entailed.

Award for Back Wages and Benefits

Mr. Willy is entitled to $131,719.04 for back wages owed and $53,465.47 for benefits owed, plus interest. The calculation of these awards may be found in Appendix A of this Recommended Decision and Order.

III. Exemplary Damages

Complainant has requested imposition of exemplary damages in the range of three times the actual damages to one million dollars. Donald J. Willy's Brief on Back Pay and Damages at 14-15. In *Johnson v. Old Dominion Security*, 86-CAA-3 (Sec'y May 21, 1991), the Secretary of Labor addressed exemplary awards in whistleblower cases:

> Exemplary awards serve in punishment for wanton or reckless conduct to deter such conduct in the future. The Restatement (Second) of Torts § 908 (1979) describes a two-step analysis. The threshold inquiry centers on the wrongdoer's state of mind: did the wrongdoer demonstrate reckless or callous indifference to the legally protected rights of others, and did the wrongdoer engage in conscious action in deliberate disregard of those rights. The "state of mind" thus is comprised both of intent and the resolve actually to take action to effect harm. If this state of mind is present, the inquiry proceeds to whether an award is necessary for deterrence.

Id. @ 16-17 (footnote omitted)..

In Mr. Willy's case, the facts do not indicate the type of behavior which the courts have traditionally considered to be punishable by a punitive damage award. I find that Mr. Willy's case is appropriately analogized to that of the Complainant in *Pogue v. U.S. Dept. of the Navy*, 87-ERA-21 (Sec'y Apr. 14, 1994).[6] In both instances, a history of office-related problems had been building. Ms. Pogue's employer was deemed to have taken action which was in part retaliatory for the whistleblowing activities of Ms. Pogue and in part disciplinary. Mr. Willy's supervisor stated that Mr. Willy was fired solely because he lied about making a very important phone call to

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[6] *Pogue v. U.S. Dept. of the Navy*, 87-ERA-21 (Sec'y Apr. 14, 1994) (punitive damages not awarded where the complainant's prior work evaluations all indicated either satisfactory or marginal performance, and she had a history of problems with both work performance and getting along with co-workers; the employer had mixed motives for the actions taken against the complainant). *See also Jenkins v. United States Environmental Protection Agency*, 92-CAA-6 (Sec'y May 18, 1994) (requisite state of mind for exemplary damages not available where Respondent found to have punished whistleblowers by removing them from assignments and transferring them to undesirable positions, carefully scrutinized the complainant's actions in an attempt to find a legitimate basis for its retaliation); *Johnson v. Old Dominion Security*, 86-CAA-3 (Sec'y May 21, 1991) (exemplary damages not appropriate where Respondent merely exhibited indifference to the public health purposes of the TSCA in its treatment of Complainants; bare statutory violation is insufficient to substantiate such an award).

his co-worker and to his boss. Although it has been found that his discharge was also retaliatory in part, the lie was "inextricably mixed" with the Belcher report, which was found to be protected activity. *Willy v. The Coastal Corp.*, 85-CAA-1 @ 29 (ALJ Nov. 29, 1988). Because the evidence indicates and it is reasonable to conclude that the employer had both valid and retaliatory reasons for its actions against Mr. Willy, I do not find that the employer's behavior rose to that which could be considered reckless or callous disregard for Mr. Willy's rights. An award of punitive damages is not appropriate in this case.

IV. Compensatory Damages for Tax Consequences of Lump Sum Back Pay Award

In his supplemental brief of April 15, 1996, Complainant requests that he be compensated for any adverse tax consequences of receiving a lump sum award in a single year. Specifically, Complainant requests that any award for back pay, prejudgment interest, or exemplary damages be increased by 29.51%.

It has long been settled that "excess tax liability . . . is not a loss within the meaning of the term as used in the law of damages." *McLaughlin v. Union-Leader Corp.*, 127 A.2d 269 (N.H. 1956). Although *McLaughlin* addressed consideration of tax liability in the context of a breach of contract, in traditional tort law the conclusion is the same. RESTATEMENT (SECOND) OF TORTS § 914A (1979) ("Whether or not the award is taxed, its amount should be the same."). Mr. Willy may be correct in asserting that his lump sum damage settlement is likely to result in increased tax liability. He also correctly asserts that the Internal Revenue Service has recently changed its policy with regard to taxation of certain damages. *Tort Damages for Personal Injuries or Sickness*, RIA USTR INCOME TAX ¶ 1041.001 (Nov. 20, 1996) (discussing the changing IRS policy toward taxability of damages as a result of *Schleier, Erich v. Com.*, 132 L.Ed. 2d 294 (1995)). The *Schleier* analysis may be distinguished from Mr. Willy's proposal, however, because that case addressed the inclusion or exclusion of damages as gross income for individual income tax purposes; it did not suggest that a damage award should be higher or lower because of a resulting increased tax liability.

Mr. Willy further argues that the law governing damages in employment discrimination cases has as its goal to "make the employee whole." The uncertainty surrounding the calculation of Complainant's true tax liability[7] makes that liability impossible to determine. RESTATEMENT (SECOND) OF TORTS § 914A(2) (1979). Because the tax liability cannot be determined, there is no way to calculate what measures would be required to ensure that Complainant has been "made whole."

A number of federal courts have specifically refused to consider tax liability when determining back pay awards. For instance, in *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1580 (5th Cir. 1989) (citing *Curl v. Reavis*, 608 F. Supp. 1265, 1269 (D.C.N.C.

[7]For example, the existence of tax shelters, the possibility of the plaintiff filing a joint return with a spouse, etc.

1985)), the court declined "...to require district courts to act as tax consultants every time they grant back pay awards, speculating as to what deductions and shelters the plaintiff will find, and then calculating the plaintiff's potential tax liability." The court in *Curl* additionally stated, "[S]ince the Plaintiff is receiving her back pay in a lump sum rather than over the years she may incur a higher tax liability. . . ." *Curl*, 608 F. Supp. at 1269. That court believed, "[T]he Plaintiff's tax liability is a matter between the Plaintiff and the respective taxing authority." *Id*. As a result, the plaintiff's damage award was not adjusted to compensate for the increased tax liability.

Thus, potential tax liability simply is not taken into account in calculating damage awards in the law of tort and contract damages, and I find that the same rule is applicable to employee protection cases. Mr. Willy's award is already calculated to make him whole and for the Secretary of Labor to attempt to determine the precise amount of his tax liability would be entirely too inefficient and speculative to attempt. I therefore decline to include additional compensation pertaining to tax liability in Mr. Willy's award.

V. General Compensatory Damages

Complainant has requested $50,000.00 in compensatory damages [8] "for damages which are characteristically incapable of complete definition - such as the value of the use of a London apartment or the pain and suffering caused by interference with job relocation attempts." Donald J. Willy's Brief on Back Pay and Damages at 17. Mr. Willy contends that he is entitled to compensation for perks he enjoyed as attorney for Coastal such as a private office with a private secretary, use of corporate transportation and apartment in London, an expense account, payment of bar dues and CLE expenses, clubs dues and so forth. He contends that he would have been promoted to Senior Staff Attorney and Vice-President had he remained at Coastal. He contends that is entitled to compensation for intangibles such as job search expenses, mental anguish, emotional pain and suffering, and non-pecuniary losses such as not being able to relocate due to blacklisting. Donald J. Willy's Brief on Back Pay and Damages at 15-17. Finally, in his costs petition, Complainant identifies amounts for bar dues and CLE expenses, and for job hunting expenses, which are more properly categorized as requests for compensatory damages rather than costs related to bringing his suit.

At least some of these items are appropriate matters for consideration for a compensatory damages award. Complainant has presented no supporting documentation to establish the value of any of these items, and his supplemental costs petition was based entirely on estimates. Thus, the record does help to quantify in any concrete terms the value of Mr. Willy's loss. It is a significant circumstance that Mr. Willy was discharged and that it took several years before he was able to obtain a comparable job. On the other hand, it is also significant that Judge von

[8]Complainant also requests that interest on any compensatory damages be awarded. Interest is not awarded, however, on compensatory damages. *Smith v. Littenberg*, 92-ERA-52 (Sec'y Sep. 6, 1995).

Brand found that Complainant was discharged both for engaging in protected activity and for lying to his supervisor, and that these reasons were "inextricably mixed." *Willy v. The Coastal Corp.*, 85-CAA-1 @ 29 (ALJ Nov. 29, 1988). Thus, Mr. Willy's post-discharge losses were not entirely as a result of discrimination.

In assessing a compensatory damages award, it is appropriate to compare the facts and circumstances with other similar cases. *See Lederhaus v. Donald Pachen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec'y Oct. 26, 1992), and cases cited therein. A typical compensatory damages award in a whistleblower case ranges from $zero to $40,000, with most awards falling into the $10,000 range. In the instant case, where it is clear from the circumstances that Mr. Willy suffered damages, but there is scant testimony or documentation to quantify the scope of that damage, and where the ALJ who presided over the matter on the merits found that Complainant's discharge was only partly motivated by the protected activity, I conclude that the compensatory damages award must be modest. Thus, I recommend a compensatory damage award of $2000.00

VI. Attorney's Fees and Expenses

Complainant has requested an award of attorney's fees and expenses in the amount of $111,202.29. Donald J. Willy's Brief on Back Pay and Damages, March 8, 1996, at 7. An award of attorney's fees is based on the "lodestar" test in which the first step is to ascertain the reasonable compensable hours and the second step is to multiply that number of hours by an appropriate hourly rate. *Shipes v. Trinity Ind.*, 987 F.2d 311, 319 (5th Cir. 1993); *see also Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air*, 478 U.S. 546, 565 (1986); *City of Burlington v. Dague*, 112 S.Ct. 2638, 2641 (1992); *Cooper v. Pentecost*, 77 F.3d 829, 833 (5th Cir. 1996).

Attorneys' Fees and Expenses for Stuart Nelkin and Nelkin & Nelkin, P.C.

I find the hourly rates charged by Stuart Nelkin and Nelkin & Nelkin, P.C., to be reasonable rates for the time period covered by the petition for attorneys' fees and expenses.

The reasonableness of the compensable hours billed by Stuart Nelkin and Nelkin & Nelkin is based on consideration of Petition for Attorneys' Fees and Expenses Incurred by Donald J. Willy, filed by Nelkin & Nelkin, P.C., on April 26, 1996 [hereinafter "Petition"]. This record reflects duplicative charges for the same task performed by the same attorney in the same day. One of each duplicative charge will be eliminated because it cannot be determined whether the work was done once or twice and "[u]ncertainties should be resolved against the plaintiff, if arising because of imprecise recordkeeping without adequate justification." *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 261 (8th Cir. 1991).

1/7/85	SMN	Work on motion to compel	1.75
1/8/85	SMN	Legal research; deposition preparation	4.00

1/9/85	SMN	Work on Statutory issues	1.00
1/10/85	SMN	Meeting with client	1.00
1/21/85	SMN	Telephone conference with Judge	1.50
(reduce requested award by 9.25 hours x $175/hr = $1,618.75)			
1/13/85	RAR	Review case with MAH; discuss preparation for TEC hearing	1.00
1/14/85	RAR	Conference with client; preparation for deposition	2.00
1/15/85	RAR	Deposition of Simpson; preparation and attendance; deposition of Schroeder; meeting with MAH	7.00
1/16/85	RAR	Deposition of Fawcett; meet with MAH	2.50
1/21/85	RAR	Conference with MAH re: conference call to judge; attend conference call	1.00
1/24/85	RAR	Meet with M. Sanderson re: related case	1.50
(reduce requested award by 15 hours x $125/hr = $1,875)			
1/6/85	DC	Research motion to compel - discovery	6.25
1/9/85	DC	Research at UH library- photocopying	.25
(reduce requested award by 6.5 hours x $50/hr = $325)			

The requested attorney fee award is thereby reduced $3,818.75.

The record also indicates that attorneys MAH and RAR billed for lobbying. Time spent lobbying a state or federal legislator is not compensable without a specific showing that any discrete portion of the work product from the lobbying was work that was both useful and of a type ordinarily necessary to advance the litigation. *Webb v. Board of Education of Dyer County*, 471 U.S. 234, 243 (1985). The following claims for reimbursement of attorney's fees are disallowed for failure to adequately show that the lobbying work was necessary to advance this particular litigation:

1/14/85	MAH	Talk with Giesen of Cong. Andrews' staff	.25*
1/16/85	MAH	Phone all with Defendant's attorney and Giesen and O'Brien of Cong. Andrews' office	.25*
1/17/85	MAH	Copy cases and materials to send to Cong. Andrews' staff; letter to O'Brien (staff)	.50
1/17/85	MAH	Call with Sen. Bentsen's staff re: Brown & Root possible legislation for whistleblowers	.50
1/17/85	MAH	Follow-up phone calls with Sen. Bentsen's staff member	.25*
1/18/85	MAH	Meeting with GAP re: Brown & Root decision and similar cases	.25
1/22/85	MAH	Call from O'Brien in Cong. Andrews' office re: Brown & Root decision and	

		legislation	.25
1/23/85	MAH	Conference with O'Brien of Cong. Andrews' office and Mary Sanderson on Brown & Root decision	1.00
1/29/85	MAH	Telephone call and letter to Eric Washington of Cong. Andrews' office	.50

The requested award will be reduced by 3.75 hours x $160/hr = $600. [* indicates that the lobbying work was billed in conjunction with other work; an estimate was made that one billing increment (.25) was reasonably attributed to the lobbying work.]

The applicant for attorney's fees has the burden of proving that the number of hours for which he seeks compensation is reasonable. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). "Hours that are excessive, redundant, or otherwise unnecessary" must be excluded. *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993). The following line items from the Petition are too vague for a determination to be made as to their reasonableness and are therefore precluded pursuant to *H.J. Inc*., 925 F.2d at 260 (entries such as "legal research", "trial prep" or "met with client" and similar descriptions are too vague to permit meaningful review; such entries prevent a finding that the hours were reasonably expended) and *Hensley*, 461 U.S. at 437 (counsel is not required to record in great detail how each minute of time was expended, but "at least counsel should identify the general subject matter of his time expenditures."):

10/25/84	SMN	Legal research; meeting with client	2.50
11/07/84	SMN	Prepare for and attend conference	1.50
11/28/84	SMN	Legal research	1.50
12/03/84	SMN	Research legislative veto	1.00
12/06/84	SMN	Call from Willy	.25
01/10/85	SMN	Meeting with client	1.00
05/08/85	SMN	Call from client	.50
05/08/85	SMN	Conference with R. Reeser	.50
05/20/85	SMN	Call from client	.25
08/01/85	SMN	Letter to client	.25
(reduce requested award by 9.25 hours x $175/hour = $1,618.75)			
10/30/84	MAH	Research	.75
11/12/84	MAH	Meeting with client	.25
11/19/84	MAH	Phone call with client	.25
11/27/84	MAH	Phone call from client	.25
11/29/84	MAH	Phone call from client	.50
01/18/85	MAH	Meeting with RAR	.25
01/18/85	MAH	Meeting with client	.25
01/25/85	MAH	Conference with R. Reeser	.25
01/21/85	MAH	Conference with RAR	.50
01/21/85	MAH	Review documents	.25
01/21/85	MAH	Legal research	.50

01/22/85	MAH	Conference with client	.25
01/25/85	MAH	Phone call from client	.50
02/14/85	MAH	Call from client	.25
02/18/85	MAH	Telephone conference with client	.25
02/21/85	MAH	Review documents	1.25
02/26/85	MAH	Conference with Brewer	.25
02/27/85	MAH	Call from client	.50
03/13/85	MAH	Call from client	.50
03/25/85	MAH	Call from client	.25
04/09/85	MAH	Call from client	.75
05/02/85	MAH	Call from client	.25
05/03/85	MAH	Call from client	.50
05/20/85	MAH	Call from client	.25
08/08/85	MAH	Letter from client	.25
(reduce requested award by 10 hours x $160/hour = $1,600)			
01/14/85	KB	Call to the State Bar	.25
(reduce requested award by .25 hours x $50/hour = $12.50)			
01/16/85	KO	Review and revise letter	1.50
01/31/85	KO	Research	1.50
03/07/85	KO	Research	3.00
03/07/85	KO	Research	.25
(reduce requested award by 6.25 hours x $50/hour = $312)			

The requested attorneys fees award is thereby reduced $3,543.25.

Complainant alleged that Respondents violated the provisions of various environmental statutes when they terminated his employment on October 1, 1984. Recommended Decision and Order of November 29, 1988, at 11. The Petition includes line items for charges prior to that date. Although it is possible that these hours were necessary to the pursuit of his claim for retaliatory termination of employment, Complainant has not met his burden of proof. There is no indication in the Petition that these items were necessary or related to the retaliatory action of his employers, and "[h]ours that are . . . unnecessary" must be excluded. *Watkins*, 7 F.3d at 457.

01/07/84	MAH	Meeting with DOL, Coastal and phone calls to/from client	5.50
(reduce requested award by 5.5 hours x $160/hour = $880)			
02/08/84	RAR	Conference call with Defendant attorney discuss scheduling, letter to client	.25
02/15/84	RAR	Conference with MAH re: scheduling	.25
02/19/84	RAR	Conference with MAH re: scheduling	.25
02/27/84	RAR	Conference with MAH re: depositions, Client, scheduling of hearing	1.00
(reduce requested award by 1.75 hours x $125/hour = $218.75)			
02/12/84	KB	Call to Court of Appeals	.25

(reduce requested award by .25 hours x $50/hour = $12.50)

01/08/84	KO	Research FOIA exemption claims	5.00
01/31/84	KO	Research	1.50
02/06/84	KO	Legislative history	2.50
02/07/84	KO	Legislative history	2.00
02/13/84	KO	Legislative history	3.00
02/14/84	KO	Legislative history	5.00
02/28/84	KO	Legislative history	2.00

(reduce requested award by 21 hours x $50/hour = $1,050)

08/29/84	DC	Research attorney disclosing confidences	2.25

(reduce requested award by 2.25 hours x $50/hour = $112.50)

The requested attorneys' fees award is thus reduced $2,273.75.

Stuart M. Nelkin and Nelkin & Nelkin, P.C., request $76,232.50 for total attorneys' fees incurred. Petition, at 2. Of that requested amount, I hereby determine the amount of reasonable attorneys fees to be $65,996.75. Including the total expenses incurred, $2,273.25, Stuart M. Nelkin and Nelkin & Nelkin, P.C., are entitled to $68,270.00 for attorneys' fees and expenses.

Attorney's Fees and Expenses for Michael A. Maness

"The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant . . . should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Hensley*, 461 U.S. at 437. Mr. Maness submitted no itemization, documentation or justification for his statement that he is entitled to $32,500 in attorney's fees and $3,720.30 in expenses. His affidavit of February 24, 1996, is completely unsupported and it is impossible to determine which of the hours that Mr. Maness claimed to work were reasonably spent or whether his $200 hourly rate was appropriately applied. For these reasons, I decline to award any amount to compensate Mr. Maness for his fees or expenses.

VII. Costs

The Supreme Court in *Webb v. Board of Educ. of Dyer County*, 471 U.S. 241 (1985), made clear that time that is compensable in a request for attorney's fees must be "expended *on the litigation*." (emphasis in original) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). Likewise, compensable costs, as part of attorney fees, must be those expended on the litigation or "integrally related to the work of an attorney" and thus significant to the success of the litigation. *Wheeler v. Durham City Bd. of Ed*., 585 F.2d 618, 623-24 (4th Cir. 1978). Complainant's costs petition is based on recollection, testimony, income tax returns, and estimates. Complainant's Supplemental Costs Petition of April 26, 1996, at 2. Complainant states that he lost records during the eleven year course of this proceeding, and notes that he did not possess a copy of the record. It should be noted, however, that the complete record on file

with the ALJ's office during this remand proceeding is intact and would have been available to parties.

The following costs are found to be sufficiently related to the pursuit of this litigation and thus reasonably claimed: Wilbratte expert witness fee ($3,500), federal express delivery of briefs and pleadings to the Department of Labor and ALJ's ($155), and delivery service of briefs to Secretary and Respondents ($68).

Costs related to Complainant's job search after the termination of his employment with Merichem Corp. are not related to litigation costs. Thus, the following costs are thus found to be noncompensable: job hunting costs travel ($360) and office expenses related to personal items such as typing of personal letters and resumes ($3,000). To the extent that these items relate to compensatory damages, they are discussed above in Division V.

Complainant submitted costs which include both noncompensable costs for job search related matters and compensable costs for items sufficiently related to the pursuit of this litigation: xerox costs for resumes, cover letters and litigation documents ($740), postage for mailing resumes and briefs ($400), answering service ($1,743), and telephone charges ($2,614). Although some of these expenses clearly relate to the litigation, Complainant has not provided any documentation or evidence to show which portions of these costs are related to the litigation so they are not compensable. Likewise, the claim for parking and mileage ($915) for 4000 miles of travel to do legal research, depositions, and consultations is entirely unsupported by evidence and this court cannot adequately determine whether the claim is either reasonable or related to the litigation. Costs claimed for parking and mileage are thus not compensable.

The cost submitted for Bar dues and CLE expenses ($1,952) is completely unrelated to costs associated with the adjudication of this complaint and thus not compensable. This item's relevance as a matter of compensatory damages rather than costs is discussed in Division V above.

In sum, Complainant is entitled to $3,723 as compensation for costs expended in the course of this litigation.

VIII. Pre-judgment Interest

The fact that an environmental statute does not expressly provide for pre-judgment interest on back wages does not preclude it. *Blackburn v. Metric Constructors*, 86-ERA-4 (Sec'y Oct. 30, 1991). The assessment of pre-judgment interest achieves the goal of making the Complainant whole and is therefore awarded in this case. The calculation of pre-judgment interest is done in accordance with 29 C.F.R § 20.58(a)'s provision for the use of the rate of interest prescribed in I.R.C. § 6621 and interest is calculated quarterly. *Office of Fed. Contract Compliance Programs v. WMATA*, 84-OFC-8 (Ass't Sec'y Aug. 23, 1989), *motion for recon. den.*, (Ass't Sec'y Nov. 17, 1989) (hereinafter *WMATA*); *Blackburn v. Metric Constructors*, 86-

ERA-4 (Sec'y Oct. 30, 1991). Pursuant to Internal Revenue Manual 6151(a)(ii), the following interest rates are appropriately used for the calculation of earnings in each quarter in accordance with section 6621:

	1st Quarter	2nd Quarter	3d Quarter	4th Quarter
1997	9%			
1996	9%	8%	9%	9%
1995	9%	10%	9%	9%
1994	7%	7%	8%	9%
1993	7%	7%	7%	7%
1992	9%	8%	8%	7%
1991	11%	10%	10%	10%
1990	11%	11%	11%	11%
1989	11%	12%	12%	11%
1988	11%	10%	10%	11%
1987	9%	9%	9%	10%
1986	10%	10%	9%	9%
1985	13%	13%	11%	11%
1984	*	*	*	11%

I.R.S. Notice 746 (July, 1996) (interest 1/1/87 - 7/1/96); Rev. Rul. 86-59, 1986-1 C.B. 364 (interest 7/1/86 - 12/31/86); Rev. Rul. 85-169, 1985-2 C.B. 337 (interest 1/1/86 - 6/30/86); Rev. Rul. 85-47, 1985-1 C.B. 367 (interest 7/1/85 - 12/31/85); Rev. Rul. 84-159, 1984-2 C.B. 311 (interest 1/1/85 - 6/30/85); Rev. Rul. 84-66, 1984-1 C.B. 260 (interest 10/1/84 - 12/31/84).

Because interest is not assessed on interest, pre-judgment interest awarded in a damage award is not compounded. 29 C.F.R § 20.58(c).[9] Therefore, the amount of interest earned must be set aside in a separate sum which is never included in a further calculation of interest. *See WMATA*, 84-OFC-8 @ 5-6.

As of March 31, 1997, Mr. Willy will be entitled to $782, 655.85 for pre-judgment interest on his back wages award.[10] The calculation of this award may be found in Appendix A of

[9]Complainant contends in his Supplement Brief of April 15, 1996 that pre-judgment interest should be compounded either yearly or quarterly based on *WMATA*, 84-OFC-8 (Ass't Sec'y Aug. 23, 1989). *WMATA* does contain the statement that "Defendant's exceptions that prejudgment interest should not be compounded and that it was improper to compound it more than once a year are granted." *Id.* @ 9. Reading the entire decision in context (including the subsequent decisions in the matter *WMATA*, 84-OFC-8 (Ass't Sec'y Nov. 17, 1989) and *WMATA*, 84-OFC-8 (Ass't Sec'y Nov. 14, 1990)), however, it is clear that the Assistant Secretary's decision was that there should be *no* compounding of interest, and that the sentence quoted above should not be construed as directing yearly compounding, but merely a summary of the defendant's argument in that case.

[10]I recognize that the pre-judgment interest award in this matter is the dominate element of the total damage award. A discriminating party, however, is not to be relieved of interest on a back pay award because of the time elapsed during adjudication of the complaint. *Blackburn v. Metric Constructors*, 86-ERA-4 (Sec'y Oct.

this Recommended Decision and Order.

IX. Mr. Willy's Total Damage Award

Mr. Willy is entitled to the following damage award:

(1) Back wages:	$ 135,669.12
(2) Benefits:	$ 53,465.47
(3) Pre-judgment Interest to 3/31/97:	$ 782,655.85
(4) Compensatory damages	$ 2,000.00
(4) Attorney's Fees and Expenses:	$ 68,270.00
(5) Costs	$ 3,723.00
TOTAL:	$1,045,783.44

RECOMMENDED ORDER

I recommend that the Administrative Review Board issue the following order:

Respondents, Coastal Corporation and Coastal States Management Company, are hereby ORDERED to pay:

(1) Complainant, Donald J. Willy, $977, 513.44 for damages, interest, compensatory damages, and costs, plus any additional pre-judgment interest on the back pay portion of the award that accrues between March 31, 1997 and the ARB's final order, or date of payment, whichever occurs first.

30, 1991).

(2) Post-judgment interest on the back pay portion of the award calculated pursuant to 28 U.S.C. § 1961 (1988). *See Tritt v. Fluor Constructors, Inc.*, 88-ERA-29 @ 2-3 (Sec'y Mar. 16, 1995).

(3) The law firm of Stuart M. Nelkin & Nelkin & Nelkin, P.C., $68,270.00 for attorneys' fees and expenses.

At Washington, DC

_____

JOHN M. VITTONE
Chief Administrative Law Judge

JMV/trs/nl

Notice: This Recommended Decision and Order On Damages, Fees and Costs and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 61 Fed. Reg. 19978 and 19982 (1996).

APPENDIX A

Mr. Willy's back pay award includes the following:

Back Wages:	135,669.12
Benefits:	53,465.47
Interest:	782, 655.85
TOTAL:	**971,790.44**

Mr. Willy's back pay award has been calculated as follows:

Back Wages

	Earned	Due After 8.32% Increase	Owed
1984	49,824.13	57,420.00	7,595.87
1985	4,151.00	62,197.34	58,046.34
1986	30,093.25	67,372.16	37,278.91
1987	40,229.52	72,977.52	32,748.00
1/88-5/88	46,366.33	32,937.19	0

salary 1/88-5/88: 26,708.00
business profits: 47,180.00/year = (1/88-5/88) 19,658.33
total earned 1/88 - 5/88 = 46,366.33
amount due after 8.32% increase: 79,049.25/year = (1/88-5/88) 32,937.19

TOTAL: 135,669.12

Benefits

annual value of 1983 Coastal benefits = 12,019.00 (see Coastal exhibit 46-1)
salary for 1983 = 54,657.80 (see Mr. Willy's 1983 tax return)
benefits = 21.99% of salary at Coastal

1984 21.99% of 57,420.00 = 12,626.66/year x 2 months = 2,104.44
1985 21.99% of 62,197.34 = 13,677.20
1986 21.99% of 67,372.16 = 14,815.14
1987 21.99% of 72,977.52 = 16,047.76
1988 21.99% of 79,049.25 = 17,382.93/year x 5 months = 7,242.89

SUBTOTAL: 53,887.43

less benefits paid by Merichem (see Coastal exhibit 74, item 18 - Payroll Order)
Mr. Willy paid 1/3 (13.60 + 1.47 = 15.07/pay period x 2 = 30.14/month)
Merichem paid 2/3 (60.28/month) x 7 months = 421.96

TOTAL: 53,465.47

Interest on Back Wages and Benefits

Year	Quarter		Interest
1984 - Owed 7595.87 (wages) + 2104.44 (benefits) = 9700.31 for 4th qtr			
	4	9700.31 x 11% =	1067.03 interest
1985 - Owed 58046.34 (wages) + 13677.20 (benefits) = 71723.54 / 4 = 17930.89 / qtr			
	1	17930.89 + 9700.31 = 27631.20 x 13% =	3592.06 interest
	2	17930.89 + 27631.20 = 45562.09 x 13% =	5923.07 interest
	3	17930.89 + 45562.09 = 63492.98 x 11% =	6984.23 interest
	4	17930.89 + 63492.98 = 81423.87 x 11% =	8956.63 interest
1986 - Owed 37278.91 (wages) + 14815.14 (benefits) = 52094.05 / 4 = 13023.51 / qtr			
	1	13023.51 + 81423.87 = 94447.38 x 10% =	9444.74 interest
	2	13023.51 + 94447.38 = 107470.89 x 10% =	10747.09 interest
	3	13023.51 + 107470.89 = 120494.40 x 9% =	10844.50 interest
	4	13023.51 + 120494.40 = 133517.91 x 9% =	12016.61 interest
1987 - Owed 32748.00 (wages) + 16047.76 (benefits) = 48795.76 / 4 = 12198.94 / qtr			
	1	12198.94 + 133517.91 = 145716.13 x 9% =	13025.64 interest
	2	12198.94 + 145716.13 = 157915.07 x 9% =	14212.24 interest
	3	12198.94 + 157915.07 = 170114.01 x 9% =	15310.26 interest
	4	12198.94 + 170114.01 = 182312.95 x 10% =	18231.13 interest
1988 - Owed 0 (wages) + [7242.89 (benefits owed) - 421.96 (benefits paid by Merichem) = 6820.93 (benefits)] = 6820.93 / 5 months = 1364.19 / mo.			
	1	4092.57 + 182312.95 = 186405.52 x 11% =	20504.61 interest
	2	2728.38 + 186405.52 = 189133.90 x 10% =	18913.39 interest
	3	189133.90 x 10% =	18913.39 interest
	4	189133.90 x 11% =	20804.73 interest
1989	1	189133.90 x 11% =	20804.73 interest
	2	189133.90 x 12% =	22696.07 interest
	3	189133.90 x 12% =	22696.07 interest
	4	189133.90 x 11% =	20804.73 interest
1990	1	189133.90 x 11% =	20804.73 interest
	2	189133.90 x 11% =	20804.73 interest
	3	189133.90 x 11% =	20804.73 interest
	4	189133.90 x 11% =	20804.73 interest
1991	1	189133.90 x 11% =	20804.73 interest
	2	189133.90 x 10% =	18913.39 interest
	3	189133.90 x 10% =	18913.39 interest
	4	189133.90 x 10% =	18913.39 interest
1992	1	189133.90 x 9% =	17022.05 interest
	2	189133.90 x 8% =	15130.71 interest
	3	189133.90 x 8% =	15130.71 interest
	4	189133.90 x 7% =	13239.37 interest
1993	1	189133.90 x 7% =	13239.37 interest
	2	189133.90 x 7% =	13239.37 interest
	3	189133.90 x 7% =	13239.37 interest

	4	189133.90 x 7% =	13239.37 interest
1994	1	189133.90 x 7% =	13239.37 interest
	2	189133.90 x 7% =	13239.37 interest
	3	189133.90 x 8% =	15130.71 interest
	4	189133.90 x 9% =	17022.05 interest
1995	1	189133.90 x 9% =	17022.05 interest
	2	189133.90 x 10% =	18913.39 interest
	3	189133.90 x 9% =	17022.05 interest
	4	189133.90 x 9% =	17022.05 interest
1996	1	189133.90 x 9% =	17022.05 interest
	2	189133.90 x 8% =	15130.71 interest
	3	189133.90 x 9% =	17022.05 interest
	4	189133.90 x 9% =	17022.05 interest
1997	1	189133.90 x 9% =	17022.05 interest

TOTAL: 782,655.85